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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~238.~~ 43

SAMUEL J. SHERMAN, PLAINTIFF IN ERROR,

vs.

D. S. K. BUICK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 9, 1874.

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SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Samuel J. Sherman, plaintiff in error, and D. S. K. Buick, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Harrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the United States the ninety-eighth.

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

(Indorsed:) United States Supreme Court. Samuel J. Sherman, plff. in error, vs. D. S. K. Buick, deft. in error. Writ of error.

2 Service of a copy of the within this day acknowledged, Sept. 24, 1870.

BODLEY & RANKIN,
Attys. for Deft.

In the supreme court of the State of California.

SAMUEL J. SHERMAN, PLAINTIFF AND APPELLANT, *vs.* D. S. K. BUICK, DEFENDANT & RESPONDENT. } No. 2599

Transcript on appeal.

Moore & Laine, for appellant; Bodley & Rankin, for respondent.
Filed Sept. 27th, 1870.

GEO. SECKEL, *Clerk*,
By B. J. MARDIS, *Deputy.*

3 In the supreme court of the State of California.

Complaint.

In the district court of the third judicial district, in and for the county of Santa Clara and State of California.

SAMUEL J. SHERMAN, PLAINTIFF, *vs* D. S. K. BUICK, DEFENDANT. } No. 2599.

The plaintiff, Samuel J. Sherman, a resident of the county of Santa Clara and State of California, complains of the above-named defendant, D. S. K. Buick, and, for cause of action against the defendant, plaintiff avers that heretofore, to wit, on the first day of August, A. D. 1869, plaintiff was and still is the owner in fee, and was and still is entitled to the possession, of all and singular the land and tenements situate and being in said county of Santa Clara and State of California and described as follows, to wit, as the S. W. ¼ of S. E. ¼ of section thirty-six, (36,) township five (5) south, range one (1) east, Monte Diablo meri-
4 dian, and that being the owner in fee as aforesaid, the defendant, on the day and year aforesaid, to wit, the first day of August, 1869, against the will of plaintiff, entered into possession of said land and premises and ousted and ejected plaintiff from the possession thereof, and from thence hitherto has detained and withheld and still doth detain and withhold possession of said land and premises from plaintiff, to plaintiff's damage in the sum of five thousand dollars.

Wherefore plaintiff demands judgment against defendant as follows: That he be adjudged to be the owner of said land and premises; that he recover and be restored to the possession of said land and premises; that he recover against the defendant damages for the detention of said land and premises to the amount of five hundred dollars and costs of this suit; and that a writ of restitution issue to the sheriff of county, commanding him to remove defendant, his family, servants, and agents from the possession of said land and premises, and restore plaintiff to the possesion thereof.

MOORE & LAINE,
Attys. for Plff.

Complaint duly verified.
Filed August 21st, 1869.

5 JOHN B. HEWSON, *Clerk.*
By U. E. SQUIRES, *Deputy.*

Answer.

[Title of court and cause.]

Now comes D. S. K. Buick, the defendant above named, and, for answer to the complaint of plaintiff filed herein, denies that on the 1st day of August, 1869, or at any other time, the said plaintiff was the owner or is the owner in fee, or otherwise, of the S. W. ¼ of S. E. ¼ of section 36, township five (5) south, range one (1) east, Mt. Diablo meridian, or any part thereof.

Deft. denies, and it is not true, that on the 1st day of August, 1869, or at any other time, he ousted or ejected plff. from the possession of said [redacted] part thereof.

Deft. admits that he was on the 1st day of August, 1869, and for many years prior thereto had been, in the possession of all of said tract of land except a small tract hereinafter described.

Deft. denies that plff. has been damaged in the sum of five hundred dollars, or any other sum. Wherefore deft. demands judgment against said plaintiff for costs of suit.

BODLEY & RANKIN,
6 *Att'ys for Deft.*

Answer duly verified.
Filed and served Sept. 4th, 1868.

Agreed and engrossed statement of motion for a new trial.

[Title of court and cause.]

The plaintiff proposes the following statement on motion for a new trial:

This cause came on regularly for trial in the above-named court at the regular January term thereof, 1870, whereupon both parties having expressly waived a trial by jury, the case was tried before the court; thereupon, the defendant withdrew, by leave of court, that portion of his answer styled a cross-complaint, wherein he claimed affirmative relief against the plaintiff, and the cause was then tried upon the complaint and answer without considering the said cross-complaint of defendant, or the plaintiff's answer thereto.

The plaintiff, to maintain the issue on his part, offered himself
7 as a witness, and, being first duly sworn, testified as follows, viz:

I am the plaintiff in this action. I know the defendant, and have so known him for several years past. I know the land described in the complaint, and have, since 1862. The rental value of the same is about five dollars per acre per annum. The defendant, Buick, was in possession of sixteen (16) acres of the land described in the complaint at the commencement of this suit, and yet so is. The plaintiff then offered in evidence a patent from the United States of America to himself for the land sued for, together with other lands, it being admitted that said patent included the whole of the land sued for; which patent was admitted in evidence without objection, and is as follows, viz:

"Examined—Pre-emption certificate No. 1825.

"The United States of America to all whom these presents shall come, greeting:

"Whereas Samuel J. Sherman, of Santa Clara County, California, has deposited in the General Land-Office of the United States a certificate of the register of the land-office at San Francisco, whereby it appears that full payment has been made by the said Samuel J. Sherman, according to the provisions of the act of Congress of the 24th of
8 April, 1820, entitled 'An act making further provisions for the sale of the public lands,' for the north half of the southeast quarter and southwest quarter of the southeast quarter of section thirty-six, in township five south, of range one east, in the district of lands subject to sale at San Francisco, Cala., containing one hundred and twenty acres, according to the official plat of the survey of the said lands, returned to the General Land-Office by the surveyor-general, which said tract has been purchased by the said Samuel J. Sherman:

"Now know ye that the United States of America, in consideration of

or at any other time, he ousted or ejected plff. from the possession of said [redacted] thereof.

the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Samuel J. Sherman, and to his heirs, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging, unto the said Samuel J. Sherman, and to his heirs and assigns, forever.

"In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

9 "Given under my hand at the city of Washington, the fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-nine and of the Independence of the United States the ninety-third.

SEAL OF THE U. S. GENERAL LAND-OFFICE.

"By the President:

"U. S. GRANT,
"By J. N. BURRITT, *Secretary.*

"Recorded, vol. 3., p. 145.

"MARTIN BUELL,
"*Acting Recorder of the General Land-Office ad interim.*"

(Patent endorsed:) "United States of America to Samuel J. Sherman. Patent dated May 15, 1869. Recorded at the request of patentee, July 16, A. D. 1869, at 37 minutes past 10 o'clock p. m., in liber A, record of patents, p. 220, Santa Clara County. Jos. R. Johnson, recorder."

The plaintiff here rested.

The defendant, to maintain the issues on his part, offered himself as a witness, and testified as follows, viz:

I am the defendant in this action. I know the plaintiff, and land in contest; have had a portion of the land sued for, about 16 acres of it, in my possession some years continuously, and yet so have it;
10 the rental value thereof is about five dollars per acre per annum.

The defendant then introduced in evidence a patent from the State of California to himself, it being admitted that said patent covered the land sued for, which patent is as follows, to wit:

"UNITED STATES OF AMERICA,
"*State of California:*

"To all to whom these presents shall come, greeting:

"Whereas under the provisions of the several acts of the Congress of the United States, entitled 'An act to appropriate the proceeds of the sales of the public lands, and grant pre-emption rights,' approved September fourth, eighteen hundred and forty-one, five hundred thousand acres of the public lands were granted to the State of California; and an act entitled 'An act to provide for the survey of the public lands in California, the granting of the pre-emption rights therein, and for other purposes,' approved March third, eighteen hundred and fifty-three, ten sections of land were granted for the erection of public buildings, and seventy-two sections for a seminary of learning; also the sixteenth and thirty-sixth sections of each township in said State; also, an act en-

"Now know ye that the United States of America, in consideration of

titled 'An act donating public lands to the several States and
11 Territories which may provide colleges for the *for the* benefit of agriculture and the mechanics arts,' approved July second, eighteen hundred and sixty-two, one hundred and fiftyt housand acres of the public lands were also granted to said State; and whereas the legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time; and whereas it appears by the certificate of the register of the State land-office, No. 86, issued in accordance with the provisions of law bearing date the first day of December, A. D. 1868, that the tracts of 16th and 36th sections, grant school-land, hereinafter described, have been duly and properly located, in accordance with law, and that D. S. K. Buick is entitled to receive a patent therefor:

"Now, therefore, the State of California hereby grants to the said D. S. K. Buick, and to his heirs and assigns, forever, the said tracts of land located as aforesaid, and which are known and described as follows, to wit:

"The south half (½) of southeast quarter (¼) of section thirty-six, (36,) township (5) south, range one (1) east of Monte Diablo meridian, containing eighty (80.00) acres, taken in lieu of *of* eighty (80.00) acres, together with all the privileges and appurtenances thereunto appertaining and belonging: To have and to hold the afore-granted premises to the said D. S. K. Buick, and to his heirs and assigns, to his and their use and behoof, forever.

12 "In testimony whereof I, H. H. Haight, governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed. Given under my hand at the city of Sacramento, this the sixth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

{ GREAT SEAL OF THE STATE OF CALIFORNIA. }

"H. H. HAIGHT,
"*Governor of State.*

Attest:

"H. L. NICHOLS,
"*Secretary of State.*

{ SEAL OF STATE LAND-OFFICE. } Countersigned.

"JOHN W. BOST,
"*Register of State Land-Office.*"

(Patent endorsed:)

"Letters-patent from the State of California, issued January 6th, 1869, to D. S. K. Buick, for 80.00 acres of 16th and 36th sections grand school-land, lying in Santa Clara County." Also, "Recorded at the request of Thos. Bodley, on the 9th day of February, A. D. 1869, at 35 minutes past 9 o'clock a. m., liber A of patents, pp. 191–2, records of Santa Clara County.

"JOS. R. JOHNSON,
Recorder."

It was here admitted by the parties that the exterior lines of the township were run by the United States in 1852.

13 The defendant here rested his case.

Whereupon the plaintiff offered to prove by competent testimony, both documentary and oral—

1st. That the land in question was not surveyed by the United States until about the 11th day of August, A. D. 1866, when the official town-

ship plat thereof was filed in the United States land-office at San Francisco, California.

2nd. That the plaintiff settled upon and improved said land described in his patent as early as the 20th day of December, 1862, and has ever since resided and made his home thereon.

3rd. That he filed his pre-emption claim on said land November the 6th, 1866, and afterwards, to wit, on the 9th day of September, 1868, he made proof and payment therefor, receiving from the receiver of the United States land-office at San Francisco, California, on that day, duplicate pre-emption certificate No. 1825 for the land described in his said patent, upon which said patent issued.

4th. That the patent of defendant from the State was issued by the officers of the State, through inadvertence and by mistake; that at the time it was so issued the matter of the right to said patent was being tried in this court upon an order made by the surveyor-general
14 of California referring the same to said court for trial upon a demand made by plaintiff in that behalf.

5th. That the State selection upon which the defendant's patent is and was based was not made until about the 23rd day of December, A. D. 1863, and that at that time the plaintiff was in possession and had valuable improvements on said lands, and that no notice was given him by the State locating agent, nor any one else, that he was on State land, or must buy the same from the State.

The plaintiff's counsel announced at the time that said evidence was offered for the purpose of showing, 1st, that the defendant's patent was void for being issued by the officers of the State without authority of law; and, 2nd, to show that the plaintiff, although having the junior patent, yet had the prior equity.

Counsel for the defendant objected to the whole thereof as immaterial and irrelevant; that in actions at law the oldest patent must prevail, and that in courts of law a patent cannot be assailed collaterally.

The court sustained said objection, and refused to allow plaintiff to make any proof on said points; to which ruling the plaintiff then and there excepted.

15 Both parties here rested.

The cause was thereupon argued by respective counsel and submitted to the court for decision, and the court took the same under advisement.

Afterwards, to wit, on the 29th day of April, 1870, the court, being sufficiently advised, filed its findings and conclusions of law in writing, ordering a judgment for the defendant; said judgment was entered; which said findings, order, and judgment are as follows:

Findings.

S. J. SHERMAN }
vs.
D. S. K. BUICK. }

I find—1st. That the rental value of the land sued for is $5 per acre per annum.

2nd. That the defendant was in possession of it when this action was brought, has been since, and is now.

3rd. That he is in possession under and by virtue of a patent which includes the land issued to him by the State of California on the 6th January, 1860.

4th. That subsequently the Government of the United States issued to the plaintiff a patent for the same land, and by it the plaintiff claims in this action equitable rights against the defendant.

16 My conclusion is, that the patent to the defendant must prevail against the subsequent patent to the plaintiff, and that the defendant is in consequence the owner, and rightfully in possession, and is entitled to judgment; and it is so ordered.

S. B. McKEE,
Dist. Judge.

Let proceedings be stayed on the judgment to be entered herein for ten days after service of notice upon plaintiff's attorney of the filing of this finding.

McKEE, *J.*

(Finding endorsed:) Filed April 29, 1870.
JNO. M. LITTLEFIELD, *Clerk*,
By WM. B. HARDY, *Deputy.*

Judgment.

[Title of court and cause.]

At the regular*ly* January term, A. D. 1870.

This cause coming on regularly for trial, Messrs. Moore & Laine appearing as counsel for plaintiff, and Messrs. Bodley & Rankin for the defendant, a trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried by the court sitting without a jury; whereupon witnesses on the part of plaintiff and defendant were sworn and examined, and, the evidence being closed, the cause

17 was submitted to the court for consideration and decision, and by the court taken under advisement. After due deliberation thereon, the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that the defendant herein do have and recover of and from the plaintiff his costs in this behalf laid out and expended, amounting to $.

Judgment rendered April 29, 1870.
JNO. M. LITTLEFIELD, *Clerk*,
By WM. B. HARDY, *Deputy.*

Notice of the filing of the findings was served on plaintiff's attorney on the same day.

Afterwards, to wit, on the 6th day of May, 1870, the plaintiff's attorneys filed and served notice of motion for a new trial, as follows:

Notice of motion for a new trial.

[Venue and title of cause.]

To the clerk, the defendant above named, and Messrs. Bodley & Rankin, his attorneys:

You, and each of you, will please take notice that the plaintiff in the above-entitled action intends to move the court to set aside and

18 vacate the findings, conclusions of law, and judgment in the said action, and grant him a new trial of said cause; such motion will be made upon the following grounds, viz:

1st. Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial.

2nd. Insufficiency of the evidence to justify the decision and findings of the court.

3rd. The judgment and decision of the court is against law.

4th. Errors of law occurring during the trial and excepted to by the plaintiff.

MOORE & LAINE,
Attys. for Plff.

Service by copy acknowledged this 6th day of May, A. D. 1870.
BODLEY & RANKIN,
Attys. for Deft.

(Endorsed:) Filed May 6th, 1870. John M. Littlefield, clerk, by L. F. Eastin, deputy.

It was thereupon agreed by and between counsel for the respective parties that the plaintiff should have fifteen days within which to file his statement on motion for a new trial, and that all proceedings
19 in the case be stayed until said motion was heard and determined.

The foregoing statement is a full, true, and perfect statement of this case, and contains all the evidence given or offered by either of the parties, and all the objections, rulings of the court, and exceptions thereto.

Upon the foregoing statement the plaintiff moves the court to set aside and vacate the findings of fact and conclusions of law, together with the judgment in this case, and to grant him a new trial hereof; and the plaintiff now here assigns and specifies the following as the grounds and points of error upon which he will rely in support of said motion, viz:

1st. The court erred in sustaining the objections to the evidence offered by the plaintiff to show the prior equities of the plaintiff, and also to show that the patent of the defendant was void for want of power and authority in the officers of the State to issue said patent, in this, that in actions at law where both parties rely upon a patent it is proper to go behind the patents and inquire into the equities of the parties; the junior patent will in such cases attach itself to the elder equity; and it is also al'owable in such cases to show a patent void for want of authority in the officer or 'fficers issuing the same.

20 2nd. The decision of the court is against law in this, that the plaintiff showed a patent from the United States, the paramount source of title, and it should prevail over a patent from the State, a subordinate, where no equities are shown in either party as in this case.

3rd. The evidence in this case was insufficient to justify the conclusions of law and judgment in this, there was no evidence showing or tending to show any title or right in the State to the land in question; there was no evidence given or offered showing or tending to show that the land was not covered by a valid pre-emption claim before survey, or that the land had ever been certified over to the State by the United States, and until that is done the State has no title.

4th. The judgment is against law and unsupported by the findings in this, that there was no issue framed nor tried, nor was there any evidence given or offered, showing or tending to show that the defendant

had any right to recover any land or damages from the plaintiff, the pretended cross-bill having been withdrawn and no trial had thereon.

5th. The conclusions of law, judgment and decision is against law in this, that the patent from the United States, the paramount source of title, to the plaintiff is conclusive evidence of title as against all
21 the world until impeached or set aside, which was not done nor attempted in this case, and plaintiff should have had judgment.

MOORE & LAINE,
Attys. for Plff.

Service by copy accepted and made this 11th day of May, 1870.
BODLEY & RANKIN,
Attys. for Deft.

The foregoing statement is hereby agreed to and is correct, counsel for the defendant reserving the right to move the court, upon the hearing of this motion, to correct the judgment entered by the clerk, so as to accord with the order of the court; and it is hereby agreed that this motion may be heard at the next regular term of this court, in Santa Clara County.

August 2nd, 1870.

MOORE & LAINE,
Attys. for Plff.
BODLEY & RANKIN,
Attys. for Deft.

(Endorsed:) Filed May 11th, 1870. Jno. M. Littlefield, clerk, by L. F. Eastin, deputy.

22 *Order overruling motion for a new trial.*

[Title of court and cause.]

SEPTEMBER 17TH, 1870.

And now come the parties in this cause, by their counsel, and submit the motion for a new trial on file herein, and the court, after due deliberation, denies the same; to which ruling of the court in denying said motion plaintiff duly accepts.

Notice of appeal.

[Title of court and cause.]

To the clerk of the above-named court and D. S. K. Buick, the defendant herein, and his attorneys, Messrs. Bodley & Rankin:

You, and each of you, will please take notice that the plaintiff above named hereby appeals to *to* the supreme court of the State of California from the decision and judgment of the court in the above-entitled cause in favor of defendant and against the plaintiff, and from the whole thereof; which said judgment was made and entered on the 29th day of April, 1870; and also from the order of the court overruling and denying the plaintiff's motion for a new trial in the said above-entitled action, which said order was made and entered on the 17th day of September, A. D. 1870.

23 MOORE & LAINE,
Attys. for Plff.

Service hereby accepted this 19th day of Sept., 1870.

BODLEY & RANKIN,
Attys. for Deft.

Filed Sept. 19, 1870.

JNO. M. LITTLEFIELD, *Clerk*,
By W. B. HARDY, *Deputy*.

Certificate.

We hereby certify the foregoing transcript to be correct, and that a good and sufficient bond for costs on appeal has been filed in statutory time.

MOORE & LAINE,
Attys. for Plff.
BODLEY & RANKIN,
Attys. for Deft.

24 In the supreme court of the State of California, January term, 1873.

SAMUEL J. SHERMAN, APPELLANT,
vs.
D. S. K. BUICK, RESPONDENT. } 2599.

By the Court, RHODES, J.:

[No. 2599, Sherman vs. Buick. Filed February 4th, 1873.]

This action was brought for the recovery of the possession of the S. W. ¼ of the S. E. ¼ of section 36, township 5 south, range 1 east, Mt. Diablo meridian.

The plaintiff claims title under a patent issued to him by the United States on the 15th day of May, 1869.

The defendant claims title under a patent issued to him by this State on the 6th day of January, 1869.

The plaintiff offered to prove that the land was not surveyed by the United States until about August 11th, 1866, when the official township plat was filed in the land-office at San Francisco; that he settled on the land described in his patent—the N. ½ and the S. W. ¼ of the S. E. ¼ of said section 36—as early as the 20th of December, 1862, and has ever since resided thereon; that he filed his pre-emption claim on said land November 6th, 1866, and thereafter made proof and payment therefor, and received a duplicate pre-emption certificate upon which his patent issued. The court excluded the evidence.

One of the questions arising upon this ruling of the court, considered in connection with the evidence which had been admitted, is whether the title to these lands was in the United States at the time when the patent was issued to the plaintiffs or whether it had before that time vested in this State. That is the most important question in the case, and as there are other controversies in this State involving the same question it is important that it be settled without any unnecessary delay. And if our conclusion be wrong the Supreme Court of the United States may readily correct it.

The sixth section of the act of Congress of March 3d, 1853, (10 U. S. Stats., 246,) provides that "all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the

State for the purposes of public schools in each township, * * shall be subject to the pre-emption laws of the 4th of September, 1841," etc. It is provided by section 7 of that act "that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth or thirty-sixth sections before the same shall be surveyed, * * * other land shall be selected by the proper authorities of the State in lieu thereof," etc. The third proviso to the sixth section is as follows: "Provided, That nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settler be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that date." This proviso was extended by the act of March 3d, 1854, so as to permit settlements to be made on unsurveyed land within two years after the passage of the act. There is only one other act of Congress which purports to grant permission to settle upon and acquire pre-emption rights to unsurveyed land in this State, and that is the act of May 30th, 1862, (12 U. S. Stats., p. 409.) The first clause of the seventh section is in these words: "That in regard to settlements which by existing laws are authorized in certain States and Territories upon unsurveyed lands, which privilege is hereby extended to California," the pre-emption claimant is required to file his declaratory statement within a certain time mentioned in the section. We are referred by counsel to several acts then in force, which granted the right of pre-emption of unsurveyed land; and among others are the act of August 4th, 1854, "to extend the right of pre-emption over unsurveyed lands in Minnesota, and for other purposes," (10 U. S. Stats., 576;) the act of July 17, 1854, concerning public lands in Oregon (10 id., 305;) the act of July 22d, 1854, to establish the offices of surveyor-general in New Mexico, Kansas and Nebraska, (id. 308, sec. 7;) and the resolution of March 3d, 1857, relative to sections 16 and 36, in the Territories of Minnesota, Kansas, and Nebraska, (11 id., 254.) These acts authorize settlements to be made on unsurveyed land in the Territories mentioned in the respective acts, and the last refers specially to sections 16 and 26.

It was held by this court in Higgins vs. Houghton (25 Cal., 252) that the act of Congress of March 3d, 1853, vested in this State the title to the sixteenth and thirty-sixth sections in each township; that the power of locating the land granted, by means of a survey of the public lands, was reserved to the General Government, and, "as fast as townships thereafter were surveyed and sectionized, that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quality, but as to position also." In support of that position the court cited Dall vs. Meader, (16 Cal., 296;) Van Valkenburg vs. McCloud, (21 Cal., 330,) and Foley vs. Harrison, (15 How., 447;) and the court added "that by the grant of the sixteenth and thirty-sixth sections to the State in full property, they were effectually withdrawn from the operation of the acts relating to pre-emptions." The lands in controversy were mineral lands. The grant, so far as respects the location of the lands granted, was, of course, subject to the exception of lands reserved by competent authority, and lands to which a valid right of pre-emption should attach, under the provisions of the act, prior to the survey; that is to say, the lands to which a valid right of pre-emption might be acquired by means of a settlement which had already been made, or which might be made within one year after the passage of the act.

The words of grant in the swamp-land act of Congress of the 28th of September, 1850, are that the lands "shall be, and the same are hereby, granted to said State."

In Summers vs. Dickinson (9 Cal., 554,) and Owen vs. Jackson, (id. 322,) it was held, that those words imported a present grant; and in Keeran vs. Griffith (27 Cal., 87) this court reviewed the question, and again came to the conclusion that the act operated as a full and perfect conveyance in presenti. The plaintiff in the last case claimed title under a patent issued by the State as for "swamp and overflowed land," and the defendant claimed title by virtue of an entry under the homestead act of 1862, the entry being subsequent to the date of the patent issued by the State.

The question as to the construction of the swamp-land act of 1850 was again considered in Robinson vs. Forrest, (29 Cal., 317.) The plaintiff claimed title under a swamp-land patent, and the defendant had entered on the land while it was unsurveyed, claiming the right of pre-emption. The court gave the same construction to the act as was given in Keeran vs. Griffith, but with a qualification in respect to certain parcels of swamp and overflowed land, which is not material to the question now before us. The question as to whether after the passage of the swamp-land act of 1850 Congress had competent authority to grant the privilege of acquiring rights in those lands under the pre-emption or homestead laws, was not considered in those cases, nor, in view of the construction which the court gave to the act, would it seem necessary to have done so, for it would be a palpable contradiction in terms to say that the act operated as a grant in presenti of the "swamp and overflowed lands," and at the same time hold that Congress might change, impair, or destroy the grant by creating further limitations, reservations, or exceptions, or by conferring on other parties the title, or the right or privilege of acquiring the title, to the same lands.

Accepting as correct the construction of the words of the sixth section of the act of March 3d, 1853, as announced in Higgins vs. Houghton, supra, our conclusion is that the title to each sixteenth and thirty-sixth section, upon its being surveyed, vested absolutely in the State; that Congress had no power after the passage of that act to impair the grant or prevent the title to those sections upon their being surveyed from vesting in the State; and that, therefore, the act of Congress of May 30th, 1862, did not have the effect to extend the right of pre-emption over those sections.

Judgment and order affirmed.

We concur:

BELCHER, J.
WALLACE, C. J.
CROCKET, J.
NILES, J.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above-entitled cause, on the 4th day of February, A. D. 1874, and now on file in my office.

Witn/ss my hand and the seal of the court this 31st day of July, A. D. 1874.

[SEAL.]

GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

25 In the supreme court of the State of California, January term, A. D. 1874.

SAMUEL J. SHERMAN, APPELLANT,
vs.
D. S. K. BUICK, RESPONDENT.

Onappeal from the district court of the 3rd judicial district, in and for the county of Santa Clara.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order of the district court of the 3rd judicial district, in and for the county of Santa Clara, in the above-entitled cause be, and the same is hereby, affirmed, and the opinion heretofore filed will stand as the opinion of the court.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 21st day of Febru ary, A. D. 1874, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 31st day of July, A. D. 1874.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

(Indorsed:) No. 2599. In the supreme court, State of California. Remittitur. Sherman vs. Buick. Clerk's costs, $25.00. Paid by appellant, $25.00. Paid by respond't, $. Total, $25.00. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

26 In the supreme court of the State of California.

SAMUEL J. SHERMAN, APPELLANT,
vs.
D. S. K. BUICK, RESPONDENT, } No. 2599.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the transcript on appeal, and of the judgment and the opinion rendered in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 31st day of July, A. D. 1874.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

27 Know all men by these presents that we, Erwin J. Crane, of the city of Oakland, in Alameda County, and James M. McDonald, of the city and county of San Francisco, both in the State of California, are held and firmly bound unto D. S. K. Buick, of Santa Clara County, in said State, in the sum of two thousand dollars, good and lawful money of tl e United States, to be paid to the said D. S. K. Buick, his executors

or administrators, to which payment, well and truly to be made, we do bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this thirteenth day of May, A. D. 1874.

Whereas in an action pending in the district court of the twentieth judicial district of the State of California, within and for the
28 county of Santa Clara, wherein one Samuel J. Sherman is plaintiff and one D. S. K. Buick is defendant, in which said action an appeal was taken to the supreme court of said State by said plaintiff, as appellant, and on said appeal the judgment of said district court was by said supreme court affirmed, said plaintiff, appellant as aforesaid, is about to prosecute a writ of error to the Supreme Court of the United States, to reverse the said judgments of said supreme court and said district court:

Now, therefore, the condition of this obligation is such, that if the above-named Samuel J. Sherman shall prosecute his writ of error to effect, and shall answer all damages and costs, if he shall fail to make good his plea, then this obligatio n shall be void; otherwise the same shall be and remain in full force and virtue.

ERWIN J. CRANE. [SEAL.]
J. M. McDONALD. [SEAL.]

Sealed and delivered in presence of—
F. J. THIBAULT.

29 STATE OF CALIFORNIA,
City & County of San Francisco, ss:

Erwin J. Crane, of the city of Oakland, Alameda County, in said State, and James M. McDonald, of the city and county of San Francisco, in said State, being duly sworn, severally say, each for himself, that he is one of the persons named in and who executed the foregoing obligation, and that he is worth the sum named therein as a penalty, exclusive of property exempt by law from seizure on execution, over and above all debts and liabilities, and that he is a freeholder in said State of California.

ERWIN J. CRANE.
J. M. McDONALD.

Subscribed & sworn to before me this 14th day of May, 1874.
[SEAL.] F. J. THIBAULT,
Notary Public.

30 (Indorsed:) The within bond is approved June 25th, 1874.
STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Ct.

31 UNITED STATES OF AMERICA, *ss:*

To D. S. K. BUICK, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, in which Samuel J. Sherman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should

not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Stephen J. Field, associate justice of the United States Supreme Court, this 25th day of June, A. D. 1874, and of the Independence of the United States the ninety-eighth.

[SEAL.] STEPHEN J. FIELD,
Associate Justice of the U. S. Supreme Court.

32 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Geo. A. Nourse, of the county of Alameda, in said State, being duly sworn, says that on the first day of July, A. D. 1874, at the city of San José, in said State, he personally served the within citation upon Thomas Bodley, one of the attorneys for the defendant in error in the within-named action, by showing to him the said citation, and giving to and leaving with him a true copy thereof.

GEO. A. NOURSE.

Subscribed & sworn to before me this third day of July, 1874.

[SEAL.] JOS. F. O'BEIRNE,
Dep. Clk. and Commissioner of U. S. Circuit Court, Dist. of Cala.

(Indorsed:) United States Supreme Court. Samuel J. Sherman, plff. in error, vs. D. S. K. Buick, deft. in error. Citation.

(Indorsement on cover:) No. 238. Samuel J. Sherman, plaintiff in error, D. S. K. Buick. California supreme court. Filed 9th September, 1874.

In the Supreme Court, United States.

SAMUEL J. SHERMAN,
Plaintiff in Error,

vs.

D. S. K. BUICK,
Defendant in Error.

No. 43.

In Error to the Supreme Court of the State of California.

Brief for Plaintiff in Error.

S. M. WILSON,
GEO. A. NOURSE,
Counsel for Plaintiff in Error.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1876.

No. 43.

In the Supreme Court of the U. S.

SAMUEL J. SHERMAN, *Plaintiff in Error,*

vs.

D. S. K. BUICK, *Defendant in Error.*

In Error to the Sup. Court of State of California.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action in the nature of ejectment, brought in the Third (now Twentieth) District Court of the State of California, to recover possession of the S. W. ¼ of S. E. ¼ of Section 36, Township 5 South, of Range 1 East Mt. Diablo Meridian, according to the U. S. Government survey.

At the trial the plaintiff, to prove his title, put in evidence a patent of the demanded premises, bearing date May 15, 1869, issued by the United States to him, the said plaintiff, and thereupon rested his case; defendant's possession not being denied by the answer, which under the Code of California, amounts to an admission.

Defendant thereupon put in evidence a patent bearing date Jan. 6, 1869, from the State of California to him, the said defendant, of the *south half of* the south east quarter of said Section 36, including the demanded

premises with other land; and thereupon rested his case, it being admitted that the *exterior lines of the township* were run by the United States in 1852.

The plaintiff then "offered to prove by competent 'testimony, both documentary and oral,

"1st. That the land in question was not surveyed by "the United States until about the eleventh day of Au- "gust, A. D., 1866, when the official township plat there- "of was filed in the U. S. Land Office at San Francisco.

"2d. That the plaintiff settled upon and improved "said land described in his patent as early as the twen- "tieth day of December, 1862, and has ever since re- "sided and made his home thereon.

"3d. That he filed his pre-emption claim on said "land November 6th, 1866, and afterwards, to wit, on "the ninth day of September 1868, he made proof and "payment therefor, receiving from the Receiver of the "U. S. Land Office at San Francisco, California, on "that day, duplicate pre-emption Certificate No. 1825 "for the land described in said his patent, upon which "said patent issued.

"4th. That the patent of defendant from the State "was issued by the officers of the State through inad- "vertence and mistake; that, at the time it was so is- "sued, the matter of the right to said patent was being "tried in this Court (the Court below) upon an order "made by the Surveyor-General of California, referring "the same to said Court for trial upon a demand made "by the plaintiff in that behalf.

"5th. That the State selection upon which the de- "fendant's patent is and was based, was not made until "about the twenty-third day of December, A. D., 1863, "and that at that time the plaintiff was in possession, "and had valuable improvements on said lands, and

" that no notice was given him by the State Locating " Agent or any one else, that he was on State land, or " must buy the same from the State."

" Counsel for the defendant objected to the whole " evidence offered, as immaterial and irrelevant.

" That in actions at law the oldest patent must prevail.

" And, that in courts of law a patent cannot be assailed " collaterally."

The Court sustained the objections, and refused to admit any of the offered evidence; to which ruling the plaintiff duly accepted.

Judgment being given for defendant, the plaintiff appealed to the Supreme Court of the State of California On this appeal the judgment of the District Court was affirmed.

In error to said Supreme Court, the question before this Court is simply whether there was error in the rejection of said evidence.

The question in the case is purely one of title, as the record shows. Each party claims to be the owner in fee simple of the demanded premises, and each party seeks to deraign title from the United States—confessedly the paramount source of title.

The plaintiff rests upon his U. S. patent of May 15, 1866, seeking, by the rejected evidence, to connect it by relation with his pre-emption settlement made on the demanded premises Dec. 20, 1862.

The defendant claims that the title to the demanded premises (being parcel of a Section 36), passed to and vested in the State of California by force of, and immediately upon the passage of, the Act of Congress of March 3, 1853, entitled " An Act to provide for the " survey of public lands in California, the granting of " pre-emption rights therein, and for other purposes."

In Section 6 of that Act the "school land grant" to the State of California, so relied upon by defendant, is made in these words:

"All the public lands in the State of California, "whether surveyed or unsurveyed, *with the exception of* "*Sections sixteen and thirty-six, which shall be and hereby are* "*granted to the State for the purposes of public schools in* "*each township*, * * * * * * shall be subject to "the pre-emption laws, &c., &c.

In argument, counsel for defendant have always claimed that this grant, being made in words *de presenti*,— "are hereby granted"— vested in the State *at once, as of the date of the passage of the Act*, the title in fee to all lands in California, even though then *un*-surveyed, which should, on survey be in a Section 16 or 36.

I.

It was competent for the plaintiff to show in this action— notwithstanding the State patent then in evidence—that, at the time said patent issued to defendant, the State had no title to the land in controversy; and so, no title passed to the defendant by the State patent. This can be done as well at law as in equity. It is only where merely the correctness of the method of action of the officers of the Government in issuing the patent is questioned, that the party resisting a government patent is driven to a Court of Equity.

"There are cases in which a grant is absolutely void "as where the State has no title to the thing granted * "* * * * *. In such cases the validity of the grant "is necessarily examinable at law."

9 Cranch 87, *Polk's Lessee* v. *Wendell* (p. 99).

"We may therefore assume as the settled doctrine of

" this Court, that if a patent is absolutely void upon its " face, * * * * * *, or the State had no title, it " may be impeached collaterally in an action of eject- " ment."

11 Wheaton, 381, *Patterson* v. *Winn* (p. 384).

" A patent is the instrument by which the Govern- " ment, whether State or National, passes its title; it is the " Government conveyance. But if the Government " possesses at the time no title, none passes by its execu- " tion. It is, of itself, evidence of title, only because " Government, being the original source of title, the " presumption of law is that the title remained with the " Government until some other disposition of it is shown." * * * * A Court of Law "is fully competent to " pass upon the question whether a title existed at the " time in the Government, as it would be whether the " title existed in an individual, where the grantor is a " private party."

Per Field, J., in *Patterson* v. *Tatum*, U. S. Circuit Court, California—" Pacific Law Reporter," Oct. 6, 1874.

See also :

16 Cal. 295, *Doll* v. *Meador* (p, 324);
24 Cal. 609, *Terry* v. *Megerle* (pp. 628–9);
6 Wallace, 160, *Reichart* v. *Phelps* (p. 165);
21 Id. 660, *Norton* v. *Nebraska* (p. 675).

II.

The settlement on the demanded premises made by plaintiff in December, 1862, *and by him offered to be proven at the trial, took this Section* 36 *out of the school land grant of six-*

teenth and thirty-sixth sections, by bringing it within the exception to that grant made by Section 7 of the granting Act.

Said Section 7, so far as pertinent to this case, reads as follows: "Where any settlement by the erection of a "dwelling house, or the cultivation of any portion of the "land, shall be made upon the sixteenth and thirty-sixth "sections, before the same shall be surveyed, * * * * * * "other land shall be selected by the proper authorities of "the State in lieu thereof."

1. *At the date of plaintiff's said settlement, said land was unsurveyed, within the meaning and intent of said Section 7. Mere running of the exterior lines of a township constitutes no "survey" of the land in said township by the U. S. Government.*

A township of public land of the United States is not "surveyed" until the section lines are run, the plat made and approved by the U. S. Surveyor-General, and a copy thereof filed in the proper U. S. Land Office. This not being done until August, 1866, as plaintiff offered to prove, plaintiff's settlement (offered to be proven as made in December, 1862) was made on unsurveyed land.

18 How. 43, *Barnard's Heirs* v. *Ashley's Heirs* (p. 46);
Middleton v. *Low*, 30 Cal. 604;
44 Cal. 371, *Collins* v. *Bartlett* (p. 382);
Finney v. *Berger* (Sup. Court, California), reported in "Pacific Law Reporter," Aug. 31, 1875;
Oakley v. *Stuart*, Ibid. Dec. 28, 1875.

2. *Said settlement was made by authority of express provision of U. S. statute.*

The period of one year was allowed by the statute of March 3, 1853 (already refered to) for pre-emption settlement on unsurveyed land. This time was extended to

March 1, 1856, by the Act of Congress of March 1, 1854. Section 7 of the statute of May 30, 1862 (12 Stat. at Large, p. 410) again opened all the unsurveyed lands of the United States in California to pre-emption settlement, and under this Act, less than seven months after its passage, plaintiff's settlement was made.

The statute of Feb. 14, 1859 (11 Stat. at Large, p. 385) was one of the "existing laws" extended by this last cited Act, to California. This statute provided that settlers who had settled upon any Section 16 or 36 before survey, might, after survey, "pre-empt their settlements" so made.

3. *Nor was plaintiff's settlement—thus made under a subsequent pre-emption law—less effectual to bring this Section* 36 *within the exception made to the school land grant by Section* 7 *of the Act of March* 3, 1853, *than if such settlement had been made within the year after the passage of said Act, during which only it opened unsurveyed lands to pre-emption settlement.*

The Supreme Court of California, in their reported opinion in the case at bar, say, that no pre-emption settlement made before survey on a Section 16 or 36, not made before the granting Act, or within the one year thereafter for which said Act opened unsurveyed land in California to pre-emption settlement, could take the section so settled upon out of the operation of the school land grant by compelling the State to take other lands in lieu, under Section 7 of said granting Act of March 3, 1853.

That Court gave no reason for this extraordinary assumption. Apparently none can be given. The language of the said section 7, as already quoted, is as broad as it can possibly be made. If the bill were drawn with the intention to include "*any* settlement"—whether

made by pre-emption settler (under the same Act, or any subsequent Act which might be passed)—grant claimant—town-site resident, or "honest miner," (then a mere trespasser)—the language could not be more fitly chosen to carry such intention into effect.

Evidently Congress, in accordance with the traditional policy of our Government, intended to reserve to itself exclusively the power to deal with all actual settlers whom it might find on the public domain; taking care to indemnify the State for lands taken out of its school land grant by reason of such settlement, by giving to it other lands in lieu.

4. *If the Supreme Court of California is correct in its assumption above mentioned, then towns, no matter how populous, situated on mineral lands, would not be exempted from the school-land grant.*

Yet the inhabitants of such towns are, by section 8 of the Act of March 3, 1863, expressly allowed the "right of occupation and cultivation until Congress shall dispose of" the land.

Can it be that such a settlement—made by the people of a town before survey on land afterwards proving to be in a Section 16 or 36—would not bring such section within the exception made by Section 7 of the Act of March 3, 1853?

III.

No title to any Section sixteen or thirty-six could vest in the State by virtue of the school land grant of March 3, 1853, *already cited, until the section lines should be run, the township plat made, and approved by the U. S. Surveyor-General, and a copy filed in the proper U. S. Land Office.*

We have already seen that until these preliminaries have been performed, there is no survey.

1. *Until survey, there is no Section* 16—*no Section* 36. *The land is there; but it is not Section* 16 *or* 36, *any more than the man is President of the United States until elected and qualified.*

The survey does not merely *designate* the land already granted; it *creates* the Section 16 or 36.

27 Cal. 515 *Grogan* v. *Knight* p. 521);
29 Id. 317 *Robinson* v *Forrest* (p. 325).

"The lines are not *ascertained* by the survey, but they "are *created.*"

30 Cal. 596, *Middleton* v. *Low* (pp. 604–5):
18 How. 173, *Cooper* v. *Roberts* (pp. 179–180);
9 Id. 356, *Gaines* v. *Nicholson.*

2. *Until there is a Section* 16 *or* 36, *nothing can pass by the grant of a Section* 16 *or* 36; *even though the grant be made in words de presenti:*—"*shall be and hereby are granted.*"

It is elementary law that a grant cannot take effect until there shall be a subject matter of such grant.

2 Black. Com. 296.

"So as in every grant there must be a grantor, a gran-"tee, and a thing granted."

See also, 8 Opin. Attorney-General, 244.

The 500,000-acre grant made to each State by Section 8 of the Act of September 4, 1841, provides that "there shall be and *hereby is granted* to each new State" enough, with what it may have received in its territorial condition, to make up 500,000 acres; but it has always been held that the grant attaches to no particular land until survey and selection thereof.

24 Cal. 609, *Terry* v. *Megerle* (p. 624);
27 Id. 322, *Megerle* v. *Ashe* (p. 328);
33 Id. 255, *Bludworth* v. *Lake* (pp. 261–2).

Under the Swamp Land Grant, where the line between swamp and high land crosses any 40-acre subdivision and such line must be established before it can be positively ascertained whether the greater part of such subdivision is swamp or high land—it is held that no title vests in the State until *actual survey* by the United States.

27 Cal. 87, *Kernan* v. *Griffith*;
29 Id. 317, *Robinson* v. *Forrest.*

But there is no necessity for seeking a merely analogous case.

In cases on all fours with this, precisely this point has been settled by this Court. See the cases already cited, under similar grants.

9 How. 356, *Gaines* v. *Nicholson* (pp. 364–5).

"The State of Mississippi acquired a right to every "16th section, by virtue of these Acts, on the extinguish- "ment of Indian right of occupancy, the title to which, "in respect to the particular sections, became vested, if "vested at all, as soon as the surveys were made, and "the sections designated."

So also in a subsequent case, this Court, affirming the doctrine above laid down, says:

"The State of Michigan was admitted to the Union "with the unalterable condition 'that every Section No. "'16 in every township of the public lands, and where "'such section has been sold or otherwise disposed of, "'other lands equivalent thereto, and as contiguous as "'may be, shall be granted to the State for the use of "'schools.' We agree that until the survey of the town- "ship and the designation of the specific section, the "right of the State rests in compact—binding, it is true,

"the public faith, and dependent for execution upon the "political authorities. Courts of Justice have no au- "thority to mark out and define the land which shall be "subject to the grant. But when the political authori- "ties have performed this duty, the compact has an ob- "ject upon which it can attach, and, if there is no legal "impediment, the title of the State becomes a legal title. "The *jus ad rem*, by the performance of that executive "act, becomes a *jus in re*, judical in its nature, and under "the cognizance and protection of the judicial authori- "ties, as well as the others."

18 How. 173, *Cooper* v. *Roberts* (p. 179).

That the use of the words "shall be and hereby are "granted," in the California granting act, have only the same effect as the words "shall be granted," used in the Mississippi and Michigan school land grants, see also,

2 Wheat. 196, *Rutherford* v. *Green's Heirs* (p. 198.)

3. *If this be not so—and if the titles to all land of the United States in California, which would be in a Section* 16 *or* 36 *upon the section lines being run, actually vested in the State, the moment the Act of March,* 3, 1853, *became a law—then all the mineral land in the State afterwards proving to be in such section became on that day the property of the State, though the survey of such land was prohibited by the same Act.*

The United States has been issuing patents for mines on lands not sectionized, ever since July 26, 1866, under the Act of Congress of that date.

14 Stat. at Large, 251–3.

If the doctrine of our opponents be correct, the title to such of these mines as prove to be in a Section 16 or 36, on the survey of the township into sections has been in the State ever since March 3, 1853, no matter how valuable the mines. Is this Court ready to adopt such a doctrine.

IV.

No title to the demanded premises having vested in the State, when the plaintiff's settlement was made, which he offered to prove and the land being at that time thus open to pre-emption settlement under the laws of the United States, the rejected evidence would have tended to prove a valid pre-emption settlement and purchase of the land by the plaintiff, ripening into a perfect title under the United States patent in evidence; which patent would take in effect by relation from the date of said settlement (*Dec.* 20, 1862), *and vest the title in plaintiff as of that date,—thus cutting out the alleged State title, which could not vest until survey in* 1866.

It is no new thing, in an action at law, for the junior patent to be tacked to a prior equity, so as to "overreach" and take precedence of a senior patent, based upon a later equity.

"But in other States the courts of law proceed upon "other principles. In the action of ejectment, they look "beyond the grant, and examine the progressive stages "of the title from its incipient state, whether by warrant, "survey, entry or certificate, until its final consummation by grant; and if found regular and according to "law in these progressive stages, the grant is held to relate back to the inception of the right, and to have "dignity accordingly."

Held, that this having been done by the State Court of Mississippi in the case under discussion, the Supreme Court of the United States would not interfere with such action.

1 Peters, 655, *Ross* v. *Borland*, (p. 664.)
13 Id. 436, *Bagnell* v. *Broderick*, (pp. 450–1.)

Especially is this the proper practice where, as in California, there is but one form of action; whether the

rights asserted would have formerly been of legal, or equitable cogniz ance. And this is the rule in California, as laid down by the Supreme Court of that State.

" If the jury should find that the plaintiff possessed " the statutory qualifications, and filed his declaratory " statement within three months after the return of the " plat to the Land Office, and thereafter performed the " acts required on his part by the regulations of the Gen- " eral Land Office, they should be instructed, that he " was entitled to a pre-emption claim to the premises, " which, when completed by a patent from the General " Government, vested him with the legal title, *and that* " *the title took effect by relation at the time of the first act per-* " *formed by him to acquire the right of pre-emption.*"

33 Cal. 74 *Megerle* v. *Ashe*, (p. 85.)

" In cases of conflicting patents from a paramount " source of title, it is well settled, that even at common " law, in actions of ejectment, the Court will look be- " hind the patents, and ascertain which party had the " prior equity. When this is ascertained, the equity " will attach itself to the legal title, which will take ef- " fect by relation at the time when the equity accrued. " *Thus it often happens that a junior patent, founded on a* " *prior equity is held even in a court of law, to prevail over an* " *older patent founded upon a junior equity.*"

34 Cal. 506 *Smith* v. *Athern*, (pp. 511–512.)

But without reference to the practice of the particular State, it was always the rule at common law, "that where " there are divers acts concurrent to make a conveyance, " estate or other thing, the original act shall be pre- " ferred: and to this the other acts shall have relation."

Viner's Abr. tit. Relation 290.

" There is no rule better founded in law, reason and " convenience, than this: that all the several parts " and ceremonies necessary to complete a conveyance

These Acts authorized the selection and location by the State authorities of all the various kinds of lands granted, including the lieu lands, before survey; provided for surveys by the State authorities without any concurrence of the Federal authorities, and required the U. S. authorities to certify over what was selected; and if the latter would not do so, provided for certificates by the State authorities, and made them evidence of title. The earlier State decisions maintained these laws. They are to be found in the defendant's brief; but the later authorities held these locations void.

At the request of the State the Act of Congress was passed, approved July 23, 1866, which confirms in part the State's selections, but reserves the rights of pre-emptors and others.

So the State conformed by a repeal of the old statutes and the adoption of new to the Act of Congress last cited.

This harmonious construction of the terms of the school-land grant by both parties thereto should surely be not without weight.

S. M. WILSON,
GEO. A. NOURSE,
Counsel for Plaintiff in Error.

43

Supreme Court, United States.

DOCKET FOR OCTOBER TERM.

SHERMAN
vs.
BUICK.
} No. 43.

ADDENDUM

To Brief of Wilson & Nourse, of Counsel for Plaintiff in Error; being a reprint *in extenso* of statutes of the State of California, to which said counsel wish to call the attention of the Court.

Statutes of California, 1863, (page 798.)

No. XIV, Concurrent Resolution.

[Adopted April 24, 1863.]

"*Whereas*, The State of California, through her officers properly authorized by law, has made selections of land from the public domain in part satisfaction of the various donations made to the State by Acts of Congress; and, whereas, the State has made sales of the lands so selected to purchasers in good faith, received partial or whole payments therefor, and has issued certificates of purchase, or patents to such purchasers for the lands so selected, thereby pledging her honor to the procurement of good and sufficient titles for the same; and whereas, the Honorable Commissioner of the General Land Office at Washington, giving a different construction to some

of said laws of donation from that entertained by the authorities of the State, has decided many of such selections to have been improperly made; be it therefore—

Resolved, by the Senate, the Assembly concurring, That our Senators and Representatives in Congress are hereby requested to procure the passage of a law which shall provide that wherever the proper authorities of the State have, in good faith, selected any portion of the public domain in part satisfaction of any grant made to the State by any Act of Congress, and have sold the same in good faith, the said selections shall be confirmed to the State, and the State hereby pledges herself that, if upon final investigation and decision, it shall appear that the State has selected any lands to which she is not entitled, she shall pay into the Sub-Treasury of the United States at San Francisco, to the credit of the United States, the sum of one dollar and twenty-five cents for each and every acre of land so determined to have been improperly selected.

Resolved, That a copy of these resolutions be immediately sent by the State Register, under his seal, to the Honorable Secretary of the Interior, and one copy to the Honorable Commissioner of the General Land Office at Washington.

STATUTES OF CALIFORNIA, 1867–'68, (page, 510.)

Section 12. It shall be the duty of the Surveyor General, whenever application shall be made to him, as hereinafter provided, for any portion of the lands described in the preceding section, to communicate immediately with the proper United States Land Office, and ask that the lands described in the application shall be accepted in part satisfaction of the grant under which it is sought to be located; and when the acceptance of the Register of the United States Land Office shall have been obtained, he shall give to the party applying a certificate,

which shall authorize the county treasurer of the county in which the lands are situated to receive payment thereon.

Section 13. The Surveyor General shall, as soon as practicable after the survey of any township by the United States Surveyor General, procure of the proper United States Land Office a statement of the condition of the sixteenth and thirty-sixth sections—whether the same or any portion thereof is covered by pre-emption, private grant, or other incumbrance, so that it cannot be located by the State, or whether they are free from any claim other than that of the State.

Section 15. It shall be the duty of the State Surveyor General to represent the State in all cases of conflict of title between the State and the United States; and when he shall desire to take testimony under the provisions of the act of Congress to quiet titles in California, passed July, eighteen hundred and sixty-six, he shall request the said United States Surveyor General to set a time and place for hearing the same, and shall request that he shall name a place for said hearing convenient of access to the witnesses in the case. If the United States Surveyor General shall name any place other than his office, it shall be lawful for him to charge the State with all his necessary traveling expenses in going from his office to the place [where] said testimony shall be taken and back to his office; and all accounts for such expenses shall be approved by the State Surveyor General and paid like other State indebtedness: *Provided*, That no more than one thousand dollars shall be allowed for any one year. In any case of conflict between the United States and the State, or any purchaser under the State, when the Surveyor General of the State shall deem it necessary, he shall request the Attorney General to attend the trial on the part of the State, and it shall be the duty of the Attorney General to so attend, if not prevented by other

official duties; and the actual traveling expenses of the said State Surveyor General, and the Attorney General shall be audited by the Board of Examiners, and paid out of the general fund: *Provided*, The whole amount so paid shall not exceed five hundred dollars during any one year.

The Act of 1869–'70, page 875, referred to in our brief, is merely an amendment to section 12, just cited, not changing it in any respect affecting the case at bar.

1, POLITICAL CODE OF CALIFORNIA, (page, 632.)

Section 3,406. The Surveyor General, whenever application is made to him for any portion of the lands mentioned in section 3,398, shall communicate with the United States Land Office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located.

Section 3,407. When the acceptance of the Register of the United States Land Office is obtained, he must give to the party applying, a copy of his approval.

The acts of the State, cited on page 15 of our brief, as repealed, are hardly of sufficient importance to warrant the printing thereof.

IN THE

SUPREME COURT

OF THE UNITED STATES.

SAMUEL J. SHERMAN
vs.
D. S. K. BUICK.
} No 43.

Brief of P. PHILLIPS,

For Plaintiff in Error.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1876.

Supreme Court, United States.

SAMUEL J. SHERMAN
vs.
D. S. K. BUICK. } No. 43.

Brief of P. PHILLIPS,

FOR PLAINTIFF IN ERROR.

The plaintiff in error brought his action in the State Court of California to recover certain premises described in his writ.

These premises were patented to him by the United States on the 15 May, 1869, by virtue of a pre-emption certificate, No. 1,825. The patent recites that full payment for the same had been made, "according to the provisions of the act of Congress of 24 April, 1820, for the north half of the southeast quarter, and southwest quarter of the southeast quarter of section thirty-six, in township five south, range one east in the district of lands, subject to sale at San Francisco, California, containing one hundred and twenty acres according to the official plat of the survey of said lands returned to the General Land Office."

It was admitted that this land covers the *locus in quo*.

The defendant sets up title under a patent of the State of California, on the 6 January, 1869, for eighty acres of the same premises, by virtue of the act of Congress,

4 September, 1841, granting 500,000 acres to the State, and also the act of 3 March, 1853, granting the 16th and 36th sections in each township, and also the act of 2 July, 1862, by which 150,000 acres were conveyed to the State.

The plaintiff then offered evidence to show that the land in controversy was not surveyed by the United States until 11 August, 1866.

That he had made his settlement and improvement upon the land 20 December, 1862, and has ever since resided thereon.

That his pre-emption claim was filed November, 1866, and on the 9 September, 1868, he made proof and payment, receiving the certificate on which the patent was issued.

That when the State selection was made in December, 1863, the plaintiff had made valuable improvements, was in possession, and that no notice was given him that he was on State land, or must buy the same from the State.

A more full statement will be found on p. 6.

This evidence was rejected, and a judgment was rendered in favor of defendant; which, on appeal to the Supreme Court of the State, was affirmed.

On writ of error to this latter judgment the plaintiff in error makes the following

Assignment of Error.

The rejection of the evidence offered by the plaintiff in connection with his patent, and in rendering judgment for defendant.

The decision of the Supreme Court in this case is rested upon their prior decision in Higgins v. Houghton,

(25 Cal. 252) in which the act of 1853 is held to confer the absolute ownership of sections 16 and 36, "not only as to quantity but as to position also;" of course, say they, the grant is subject "to the exception of lands reserved by competent authority, and lands to which a valid right of pre-emption should attach under the *provisions of the act prior to the survey:* that is to say, the lands to which a *valid right of pre-emption might be acquired by means of a settlement, which had already been made, or which might be made within one year after the passage of the act.*"

The opinion in the present case thus concludes—"accepting the construction announced in Higgins v. Houghton, our opinion is, that the title to the 16th and 36th sections, upon survey, vested absolutely in the State, and that Congress had no power after the passage of the act of 1853, to impair the grant or to prevent the title to those sections, upon their being surveyed, from vesting in the State; and that, therefore, the act 30 May, 1862, did not have the effect to extend the right of pre-emption over those sections." p. 12.

Undoubtedly, if an absolute title in the *locus in quo* was vested in the State by the act of 1853, the plaintiff could acquire no title under any subsequent act of Congress.

This act is entitled "An act to provide for the *survey of the public lands* of California, the *granting of pre-emptions*, and for other purposes." 10 Stat., 244.

The title expresses the two leading purposes of the act, and affords the means of its interpretation.

It was passed shortly after the admission of the State into the Union, and is directed chiefly to the populating of its unoccupied territory.

The first five sections direct the survey.

The 6th section subjects all the lands surveyed or unsurveyed, to the pre-emption law of 4 Sept., 1841, reserving the 16 and 36 sections for school purposes which are granted to the State. This section concludes with the proviso, that no settlement shall be made on any unsurveyed public land unless the same be made within one year from the date of the act.

This is followed with a provision in the 7th section that where any settlement shall be made before survey on the 16 or 36 sections—"other lands shall be selected by the State in lieu thereof."

The 8th section provides that the public lands occupied as towns or villages, shall not be appropriated by settlers, but the same, whether settled upon before or after the survey, shall be subject to the provisions of the act of 20th May, 1844.

The 9th, 10th, and 11th sections refer to the survey.

The 12th section grants to the State two entire sections for a seminary of learning, said lands to be selected by the Governor of the State.

The 13th and last section grants ten entire sections for public buildings, to be selected in like manner as the preceding sections, and subject to the approval of the Secretary of the Interior.

The 6th, 12th, and 13th sections contain pure *donations* to the State. In each case the words of grant used are the same, and as in the 12th and 13th sections the grant did not attach to any particular tract until the selection and approval were had; so in the 6th section the legal title did not vest in the 16th section until the survey had determined its location.

The necessity for the survey to perfect the title of the State is held by the Supreme Court of California in Middleton v. Lowe, 30 Cal., 596.

It is conceded by the decision in Higgins v. Houghton, that if the settlement had been made within one year from the date of the act the patent issued thereon would have conferred a valid title.

This admits that the State had not a perfect title by words of present grant at the date of the act.

The right of pre-emption was carefully preserved, and the grant to the State was in the nature of a float until the survey was made.

Precisely the same words of present grant are to be found in the railroad grants, and in the case of Railroad v. Fremont County, the court thus describes the nature of such a grant "until the line of the road is definitely fixed upon the ground, there could be no certainty as to the particular sections of land falling within the grant, nor *could the title to any* particular section on the line of the road *vest in the company*. The grant was in the *nature of a float*, until this line was permanently fixed. (9 Wall., 94.)

So it was held in Cooper vs. Roberts, that such a grant to the State confers the *jus ad rem*, but until the survey of the township, and the designation of the particular section, the right of the State rests in compact only, when the political authorities have performed their duty, by executing the survey, the compact has then an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a *legal title*.

18 How., 179.

In the case of Leavenworth L. & G. R. R. vs. U. S., decided at the last term, speaking of the grant of alternate sections, it is said: "In the early days of the land grant system, lands supposed to be effected by a grant were, as soon as it was made, if not in advance, of it withdrawn from market. But experience proved that this proceeding retarded the settlement of the country, and

the practice was at the date of the act, not to withdraw them until the road was actually located. In this way the ordinary working of the land system was not disturbed. Private entries, pre-emptions and homestead settlements, continued within the supposed limits of the grant, *the same as if it had not been made.* But they ceased when the routes of the road were definitely fixed' and if it then appeared that any such lands had been sold or taken up by pre-emption, an equivalent was provided."

That no title vested in the State until the survey was made, is the view always entertained by Congress as will be seen by their subsequent action.

On the 1 March, 1854, it extended the time for settlements, "made within *two years* after the passage of the act," that is to 1 March, 1856. (10 Stat., 268.)

On 26 February, 1859, it was again enacted that settlements which have been made on 16 and 36 sections before the survey, shall be subject to pre-emption claimants, and, where such sections had been reserved for schools, &c., other lands of like quantity are appropriated. (11 Stat., 385.)

Both of these acts is an assertion of authority to deal with these sections until the survey has been had—words of present grant notwithstanding.

They were followed by the act of 30 May, 1862, the seventh section of which entends to pre-emption claimants in California; the laws in regard to settlements of unsurveyed lands as they exist "in certain States and Territories, with this restriction, that after the 1 Sept., 1862, the declaratory statement shall *be filed within three months*, from the receipt at the district land office *of the approved plat of the township*, embracing the pre-emption settlement. (12 Stat., 410.)

It is thus seen, the Government has always had two great objects in view in relation to its disposition of the public lands. These are the encouragement of settlers and the promotion of education.

For this purpose we find the usual reservation of the 16th section, accompanied by the most liberal inducements to settlers—providing that when it should appear by subsequent survey that the right of the settler had attached to such section, the State should not suffer, but an equivalent section should be substituted. By this arrangement both of these great objects are promoted and brought into entire harmony.

Further evidence of this policy is to be found in the joint Resolution 3 March, 1857, which provides that where settlement had been made on the 16 or 36 sections, reserved by law for the support of schools in Minnesota, Kansas and Nebraska, before they have been surveyed, the settler's right shall be confirmed and other lands shall be selected in lieu thereof. 11 Stat., 254.

By the act 26th February, 1859, these provisions were made general. It provides—

"That where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which shall be found to have been made on secs. 16 or 36, said sections shall be subject to the pre-emption claim of such settler; and if they or either of them shall have been, or shall be reserved or pledged for the use of schools, other lands of a like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors." 11 Stat., 385.

These, as well as many prior acts, show the policy of the law, and the understanding of Congress, that in the grants to the States of lands, before a survey thereof, that they are to be subject to the rights of pre-emptors.

The application of these principles is directly made to

the law now in question by the act 23d July, 1866. The 6th section declares,—"that the act 3d March, 1853, shall be construed as giving to the State (of California) the right to select for school purposes other lands in lieu of 16 and 36 sections, *as were settled on prior to survey.*"

14 Stat., 220.

It will be remembered that Sherman's settlement was made in 1862, and the *locus in quo* was not surveyed until August, 1866.

Both parties claim under patents, and these patents relate back to the exception of the respective titles.

"Thus, the patent upon a State selection takes effect, as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler.

"The two modes of acquiring title to land from the United States are not in conflict with each other. Both are to have full operations; that one controlling in a particular case, under which the first initiatory step was had."

Shepley vs. Cowan, 1 Otto, 337.

For a more full citation of authorities, I refer to the brief of Messrs. Wilson and Nourse.

P. PHILLIPS,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 238.—October Term, 1875.

SAM'L J. SHERMAN, Plaintiff in Error, *vs.* S. R. BUICK.	In error to the Supreme Court of California.

Brief of Montgomery Blair, for Defendant in Error.

STATEMENT.

This is an action of ejectment brought by the plaintiff in error in the District Court of the Third Judicial District in and for the County of Santa Clara and State of California, in August, 1869, to recover the S. W. ¼ of the S. E. ¼ of section 36, T. 5 S., range 1 E. Monte Diablo meridian, situate in said county. A jury was waived, and the action was tried before the court, and judgment given for defendant on 29th April, 1870, (p. 7,) and the judgment was affirmed (p. 13) by the Supreme Court of the state at the January Term of 1874. The case is brought here under the 25th section of the judiciary act. Plaintiff claimed under a patent from the United States, dated 15th May, 1869 (p. 3); defendant, under a patent from the State of California (p. 4). Plaintiff offered to

prove in rebuttal (pp. 5, 6): [1.] that the land was not surveyed till August, 1866; [2.] that he had settled upon and improved the land as early as December, 1862, and has continued to reside thereon; and, [3.] that he duly filed his pre-emption claim. This testimony was objected to by defendant, and ruled out, and the plaintiff excepted.

ARGUMENT.

The question raised by this proof is, whether the grant to the state by the 6th section of the act of 3d March, 1853, 10 Stat., 246, was a present grant, or took date from the survey in 1866. The section provides that "all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and are hereby granted to the state for the purposes of public schools in each township, * * shall be subject to the pre-emption laws of the 4th of September, 1841." The 7th section of the act provides "that when any settlement by erection of a dwelling-house or the cultivation of any portion of the land shall be made, upon the 16th or 36th section, before the same shall be surveyed, * * other land shall be selected by the proper authorities of the state in lieu thereof," &c. But this provision does not affect the grant here in question, because, by the 3d proviso to the 6th section, only such settlements as were made within a year, of which the plaintiff's was not one, were to be recognized. The proviso is as follows: "Provided that nothing in this act shall be construed *to authorize any settlement to be made on any public land not surveyed, unless the same shall be made within one year from the passage of this act; nor shall any right of such settler be recognized by virtue of such settlement or improvement made of such unsurveyed land subsequent to that date.*" Subsequent acts extended the permit to settle on unsurveyed lands. The act of 3d March, 1854, for two years; and the act of May 30, 1862, 12 Stat., 409,

provides "that in regard to settlements which by existing laws are authorized in certain states and territories upon unsurveyed lands, which privilege is hereby extended to California." Among other acts, the act of August 4, 1854, 10 Stat., p. 576; act of July 17, 1854, 10 ib., 305; 22d July, 1854, ib., 308, and resolution March 3, 1837, 11 ib., 254, authorized settlements on unsurveyed lands in certain of the states and territories. But these acts cannot operate to recall the grant if it was made in 1853.

The Supreme Court of the State of California held, (pp. 10, 11, 12,) that the grant of the 16 and 36 sections to the state, was *a present grant*, and that the settlement of the defendant not having been made at the date of the act, or within one year thereafter, was not excepted from the grant. This construction was also given to the act in Houghton vs. Higgins, 25 California, 255, and is sustained by the decision in Doll vs. Maeder, 16 Cal., 296; Van Volkenburg vs. McClend, 21 Cal., 330; Summers vs. Dickinson, 9 Cal., 554, construing the 500,000 acre grant; and, also, by the cases of Summers vs. Dickinson, 9 Cal., 554; Owen vs. Jackson, ib., 322; Keeran vs. Griffith, 27 Cal., 87; Robinson vs. Forest, 29 Cal., 317; Bludworth vs. Lake, 23 Cal., 255; Mezerle vs. Ashe, 27 Cal., 328; Same vs. Same, 33 ib., 74, construing the swamp-land grant.

These cases all follow the leading case of Rutherford vs. Greene, 2 Wheat., 196, construing the words "that 25,000 acres of land shall be allotted for and given to Gen. Greene and his heirs within the bounds of the land reserved for the use of the army, to be laid off by commissioners," &c. The court say: "It was contended that these words give nothing. They are in the future, and not in the present tense. The court thinks differently. They are words of absolute donation, not of any specific land, but 25,000 acres in the territory set apart. * * *Given when?* The answer is unavoidable. * *Given by force of the act.* * The allotment and survey marked

out the land given by the act of 1782, and separated it from the general mass liable to the appropriation of others."—(198–9.) And the court then proceeds to show that no later act could confer title to interfere with that given by the former.—(p. 203.) The grant vested in the grantee an immediate title to an undivided interest in the specified body of land from which that granted is to be separated. The separation being merely *partition* between the government and the grantee. This view is also adopted in Doe vs. Wilson, 23 H., 5, in which it is held that where certain Indians were by treaty to receive a quantity of land to be selected, and one of them had conveyed his right before the selection, the Indian had a vested undivided right, and was tenant in common with the United States; and that the proceedings to set apart the specific land were proceedings in partition between the United States and the Indian, so that when the partition was made, the title took effect in the specific land as of the date of the grant.

The doctrine of relation, which is uniformly applied when executive acts are required to complete a grant, whether by survey or patent, gives effect to the title whenever completed, as of the date of the inception of the grant.—(Landis vs. Brant, 10 H., 373; Chouteau vs. Gibson, 13 Wall., 92.) In Maguire vs. Tyler, 8 Wall., 650, the survey for Maguire was delayed more than fifty years; and in the meantime the land had been surveyed and patented to Tyler. But the court sustained the grant to Maguire when surveyed. The delay of the government in surveying it was not allowed to effect the rights of the grantee. The exact question here presented was decided by Mr. Justice Field, on the 25th September, 1871, in the case of the Central Pacific Railway vs. Dyer, Hurly, and others, in the United States Circuit Court for the District of Nevada. The court says: "The real question in the case is, when did the right of way to the extent of 200 feet on each side of the road vest? The defendants

contend * * that they may have acquired their interest *before the definite location of the road.* The construction for which the defendants contend is incorrect. The grant of the right of way is a present grant, speaking immediately upon the passage of the act. * * * *All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of this act, are necessarily subject to the exercise of this right.*"

A more extreme case for the assertion of the principle contended for, cannot be imagined. Here was a grant of 400 feet in width, by about 1600 miles in length, to be located on any public lands between the Missouri and the Sacramento, and yet it will not avail a subsequent purchaser, however long the survey may be delayed, to plead that he had no notice where this grant was to be fixed.

This ruling is fully sustained by this court in the leading case of Kissell vs. The Public Schools, 19 H., where the court say, at page 27, that "Duncan could not be heard to say that this parcel of land was not reserved," although what land had been actually reserved had not been ascertained by survey when he made his entry, and could not be known till the survey. In that case the survey for the schools was not made for 31 years after the grant, and seven years after Duncan's entry.

But it is obvious that this doctrine is indispensable to give effect to the will of Congress. Without it, what are called grants by *Congress*, would be a *misnomer*; for as they would on such a construction depend on the action of executive officers, they would be more properly called *executive* grants. If, for example, the grant of the school sections in California takes date only from the date of the survey, the title depends on the surveyor, and may be defeated by his negligence or connivance.

But "the right of the state," says the court, in Railroad Co. vs. Smith, 9 Wall., p. 95, "did not depend on his action, but on the act of Congress; and though the

states might be embarrassed in the operation of this right by the delay of the secretary to ascertain and make out lists of these lands, the right of the states could not be defeated by that delay." This is said of the Swamp Land Act, which, the court says, p. 99, "is *a present grant* of certain lands, * * by a description which requires something more than a mere reference to their townships, ranges, and sections to identify them," to wit, the ascertainment of their *quality*. *A fortiori* is an act *a present grant*, independent of executive delay, which requires only a mere *ministerial act* to identify the land.

This, in terms, is a present grant, and conveys sections 16 and 36 of each surveyed township, and the undivided eighteenth part of all the unsurveyed land within the state. No other conveyance has since been made by the government, or was contemplated by the law, of either the surveyed or divided land, or of the unsurveyed or undivided land. The transaction is not distinguishable from the every-day occurrence of the conveyance by one individual to another, of an undivided interest in land. In such a case no one would contend that a third party could acquire, by subsequent deed from the grantor, a title superior to that he had given to the grantee, whether the grant was of a specific subdivision, or merely of a proportion to be afterwards set apart by partition, because a subsequent purchaser necessarily takes subject to the prior deed. But no different rules or principles apply to the grants of the government than to those made by an individual. "The government cannot resume its grants," says the Supreme Court, in 9 Peters, p. 236, N. O. vs. De Armes, for "it is a principle applicable to every grant, that it cannot affect pre-existing titles."

The case of Frisbie vs. Whitney, the leading case cited to establish the contrary proposition, has no bearing on the question here. In that case Whitney claimed as a pre-emptioner, alleging settlement and readiness to pay.

But after he had settled on the land, and before he had offered to pay, Congress by special act withdrew the land from pre-emption. The question presented by the case was whether the right to pre-emption becomes vested by settlement only. The court say no. The grant was conditional; the statute required, in addition to settlement, proof of settlement and payment of the government price. These were conditions precedent, without the performance of which there was no grant. This is an unconditional grant to a specified interest, which could not be revoked, any more than a grant for the whole interest.

It is said the grant does not attach to the school sections till they are surveyed, because till then there were no such sections. This proves too much. If the thing granted does not exist, or were not described with certainty, the grant would be void, which is not the argument. The thing granted is the *land*, which did exist. "Section" is only a word of description, but it is a certain and enduring description; and a grant of a particular section is equally operative to appropriate that section, whether the lines of it have been already run or are hereafter to be run in the same manner, making the location only a question of measurement and calculation. Hence the description is as complete in the one case as in the other, and is so treated by the law; for the grant applies in terms to the "surveyed and to the unsurveyed land," and it does equal violence to the language to deny the "*unsurveyed*" lands to the schools as it would to deny them to pre-emptioners.

In Veeder vs. Guppy, 3 Wiscon., 502, there was conflict between a claimant under the state by an act similar to that of 1853, and one under the town-site act. By act of August 8, 1846, 9 Statutes, 83, the grant originated. May 9, 1848, the state was admitted, and, June 29, accepted the grant. August 8, 1848, the legislature passed act to sell. In 1852 the lands were surveyed; and July 8, 1852, the governor selected the lands; and August 28,

the President approved such selection. July 15, 1848, Veeder filed his claim for pre-emption under the state, which was long before the state title was perfected. On 17th April, 1852, the state passed the town-site act, under which Judge Guppy filed claim for the land the 13th November, 1852.

This case turned upon the construction of the act of Congress granting lands to the state; it being urged on one side that the state title did not vest until the selection of the lands, and on the other that it vested from the acceptance of the act by the state, and from then until the lands were rendered certain, the state title was vested as to a given undivided quantity to be taken from the larger body of public lands.

The court held—

1st. "The grant took effect and the title to the lands vested in the state on its admission, of an amount equal to three sections in width on each side of Fox river."—(520 and 527.)

2d. "The quantity then became defined, and the location sufficiently certain for the purpose of legislation."—(520 and 527–8.)

3d. "For it required only the *ministerial acts* of selection, approval, and survey to render the specific parcels which would fall to the state or the United States certain and definite."

4th. "The state being seized of one-half the lands on both sides of Fox river, (except those already appropriated by the United States,) and the mode of partition established, it was competent to the state to prescribe the mode and terms for the sale and disposal of the lands granted to her, which mode and terms would apply to the specific lands of the state as soon as partition was made."—(521 and 528.)

5th. "At the time of the passage of the act (of 1848) none of the land had been selected by the government and approved by the President. But the title was as complete as it ever has become to the quantity of land granted. No further act of the United States was necessary, nor was any other act ever done or performed, to vest the fee in the state."

6th. "The selection by the governor and the approval by the President were acts *of partition only, not of conveyance.* They tended in no degree to enlarge the scope of or confirm the grant. The state being the owner of the land had a right to prescribe such rules, &c., for the disposal of the lands granted, &c., as it should deem proper; and those rules would become operative on partition and apply to the particular parcels when the same shall be designated. If the United States could convey a perfect title the state could take it."—(522 and 531.)

7th. "The state had a right to say that if, when partition should be made and the land defined, any person having improvements on such parcel as should fall to the state should have the right of pre-emption."—(531–2.)

8th. "The subsequent act of April 17, 1852, could not have an *ex post facto* or retrospective effect to divest Veeder of his right, because it had, subsequently to the act of 1848, become a town-site."—(534.)

And, accordingly, the court decided for the individual against the town.

In the case of Cooper vs. Roberts, 18 How., 173, it is held that the act of 23d June, 1836, 5 Stat., p. 59, providing that section 16 "shall be granted to the state" for schools, *was a present grant* of the land, which was not surveyed until 1847, and had been leased in the meantime as mineral land by the agent of the United States, and sold afterwards as mineral land under the act of 1847, (9th St., p. 146,) which authorized the sale of such lands without excepting the school sections. And the same construction is given, in the case of Ham vs. The State of Missouri, to the 6th section of the act of 6th March, 1820, (3 Stat., 547,) providing that the "16th section in every township shall be granted to the state."

MONTGOMERY BLAIR.

MARCH, 1876.

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